In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 476

JOSEPH M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1964. A timely motion for a new trial was denied on June 12, 1964. The petition for a writ of certiorari was filed on September 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below correctly held that it was not an abuse of discretion for the Secretary of the

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Navy to refuse to transfer petitioner to the Fleet Reserve.

STATUTE INVOLVED

Section 204 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1179, as amended by Section 2 of the Act of August 10, 1946, 60 Stat. 993, provides:

> Members of the Navy who first enlisted in the Navy after July 1, 1925, * * * may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' active Federal service. After such transfer, except when on active duty, they shall be paid at the annual rate of 2½ per centum of the annual base and longevity pay they are receiving at the time of transfer multiplied by the number of years of active Federal service: * * * *Provided further,* That all enlisted men transferred to the Fleet Reserve in accordance with the provisions of this section * * * shall, upon completion of thirty years' service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive: * * * *Provided further*, That a fractional year of six months or more shall be considered a full year for purposes of this section * * * in computing years of active Federal service and base and longevity pay * * *.

STATEMENT

Petitioner, a former enlisted member of the Navy, seeks review of a decision of the Court of Claims dismissing his claim for Fleet Reserve retainer pay and retired pay. The pertinent facts are set forth in the court's opinion and may be summarized as follows:

After completing 19 years and 7 months in the regular Navy, petitioner requested a transfer to the Fleet Reserve on June 4, 1947. The Bureau of Naval Personnel approved his request and advised his commanding officer, in a communication dated July 22, 1947, that petitioner would be transferred to the Fleet Reserve on December 3, 1947. Prior to receiving notice of the Bureau's approval, however, petitioner was transferred from San Francisco to San Diego, California, and assigned to the U.S.S. *Bairoko*. The information contained in the Bureau's communication was not forwarded to petitioner at his new duty station.

Petitioner's term of enlistment expired on August 17, 1947. Some time prior to 6 a.m. on August 18, 1947, petitioner left the U.S.S. *Bairoko* without awaiting further word concerning his transfer and without taking any action to secure a discharge from the Navy.[1] As his whereabouts were unknown to the Navy, petitioner was not transferred to the Fleet Reserve on December 3, 1947. Some ten years later, on September 4, 1957, petitioner was apprehended by the Federal Bureau of Investigation as an alleged deserter from the Navy. He was tried by a general court-martial on this charge and on January 24, 1958, was found not guilty. Thereafter, the Navy issued petitioner a general discharge under honorable conditions.

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[1] In the latter part of 1945, petitioner had begun drinking to an excess. On four occasions during the next two years, he was absent without leave for varying periods of time. As a result, petitioner was convicted twice by a summary court-martial and twice by a deck court.

On April 16, 1958, petitioner submitted to the Bureau of Naval Personnel a rebuttal to his general discharge and, in addition, a representation in support of his application for reenlistment in the Navy. Upon recommendation of an administrative board of review, the Chief of Naval Personnel did not authorize petitioner's reenlistment. Petitioner then applied to the Board of Correction of Naval Records for a correction of his records to reflect that he was permitted to reenlist in the Navy and to apply for a transfer to the Fleet Reserve or, in the alternative, that he was transferred to the Fleet Reserve retroactive to August 17, 1947. The Board determined that no change, correction, or modification of petitioner's record was warranted, and its determination was sustained by the Secretary of the Navy.

On June 1, 1961, petitioner instituted this action in the Court of Claims, seeking (a) active duty pay and allowances from September 4, 1957, the date he was apprehended by the FBI, to March 31, 1958, the date he was discharged from the Navy, and (b) Fleet Reserve retainer pay from August 18, 1947, until his completion of 30 years' naval service and, thereafter, retired pay, except for the intervening period of active duty. The Court of Claims held that petitioner was entitled—as the government had conceded—to recover active duty pay and allowances from the date of apprehension to the date of discharge, but dismissed his petition as to the balance of his claim (Pet. App. 13a). The court reasoned that petitioner was "entitled to retired pay only if he [had been] entitled to be placed in the Fleet Reserve" (Pet.

App. 1a). And, the court determined that whether an enlisted member of the Navy was entitled to be transferred into Fleet Reserve was a matter which was discretionary with the Secretary of Navy (Pet. App. 4a). The court concluded that "it is not an abuse of discretion for the Secretary to refuse to transfer a man to the Fleet Reserve where, as here, his period of service culminated in an extended absence without leave" (Pet. App. 5a).

ARGUMENT

Section 204 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1179, as amended by Section 2 of the Act of August 10, 1946, 60 Stat. 993, provides, in part, that members of the Navy who enlisted after July 1, 1925, "may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' active Federal service."[2] The Court of Claims, adhering to its earlier decisions in *Unger* v. *United States*, 326 F. 2d 996, and *Peterson* v. *United States*, 292 F. 2d 892, held that, under this language, the granting of a request for transfer lies within the discretion of the Secretary. That construction is clearly correct. The immediately preceding section of the Act, Section 203, provides that men who enlisted *prior* to July 1, 1925, "shall be entitled to be transferred to the Fleet Reserve" on the completion of sixteen years' service.[3] The use of the permissive

[2] In the codification of Title 10 in 1956, the essence of Section 204 was codified in Section 6330.

[3] Sections 203 and 204 of the Naval Reserve Act of 1938 are merely restatements of Sections 26 and 23, respectively, of the Act of February 28, 1925, 43 Stat. 1080, 1087.

"may * * * be transferred" in Section 204 is in significant contrast to the mandatory "shall be entitled" in Section 203. Nothing in the legislative history of Section 204 suggests that Congress intended the word "may" to mean "shall" or "must." S. Rept. No. 2082, 75th Cong., 3d Sess., p. 6; H. Rept. No. 2465, 75th Cong., 3d Sess.; 83 Cong. Rec. 8213.[4] In other contexts, "may" has been given its normal and commonly understood meaning, in accordance with familiar rules of statutory construction. *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U.S. 552, 560; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, 36–37.

Moreover, it was plainly not an abuse of discretion for the Secretary to refuse to transfer petitioner to the Fleet Reserve. As the Court of Claims pointed out (Pet. App. 5a), petitioner could not have fulfilled the requirements for membership in the Fleet Reserve (Section 206 of the Act, 52 Stat. 1175, 1179; *United States* v. *Fenno*, 167 F. 2d 593 (C.A. 2)). For, since his whereabouts were unknown to the Navy, he was unavailable for recall to active duty or for examina-

[4] Petitioner contends that the Court of Claims' interpretation of Section 204 "is contrary to the representations made by the Navy spokesmen during the legislative history of the bill ultimately enacted as the Navy Reserve Act of 1938, *supra*" (Pet. 7–8). Those representations, however, were made in connection with Section 203, not 204. Hearings Before the Committee on Naval Affairs, House of Representatives, 74th Cong., 2d Sess., pp. 2113–2114, 2200–2201. The colloquy reproduced in footnote 1 on pages 8 and 9 of the petition began after the Fleet Reserve spokesman, Mr. Lofgren, had suggested that Section 203 in the proposed bill—which provided, in part, that "Men serving having enlisted prior to July 1, 1925, may be transferred"—be changed to read "Men serving having enlisted prior to July 1, 1925 shall be entitled to be transferred."

tion to determine if he remained qualified for such duty.[5]

In sum, the decision of the Court of Claims is correct and presents no occasion for further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Contrary to petitioner's contention (Pet. 5), the court below did not state, as a reason for upholding the Secretary's decision, that petitioner's alcohol problem rendered him unfit for active duty. Rather, the court was of the view that petitioner "could not fulfill the requirements for membership in the Fleet Reserve," *i.e.*, fitness for active duty, because his unauthorized absence rendered him "unavailable for further duty or for examination to ascertain whether he remained qualified for such duty" (Pet. App. 5a).

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